No. 83-576

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

In re AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner

(ON PETITION FOR A WRIT OF MANDAMUS TO THE HONORABLE PIERCE LIVELY, CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT)

BRIEF IN OPPOSITION OF RUBY CLARK, AN INTERESTED PARTY

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COUNTER-STATEMENT OF QUESTION PRESENTED

MAY A WRIT OF MANDAMUS ISSUE FROM THIS COURT TO COMPEL A DISCRETIONARY ACT OF THE COURT OF APPEALS, OR TO COMPEL A STATUTORY CONSTRUCTION, OR TO RESOLVE A MATTER OF INTERLOCUTORY APPEAL?

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REASONS FOR DENYING THE WRIT

A WRIT OF MANDAMUS SHOULD NOT ISSUE FROM THIS COURT TO COMPEL A DISCRETIONARY ACT OF THE COURT OF APPEALS, NOR TO COMPEL A STATUTORY CONSTRUCTION, NOR TO RESOLVE A MATTER OF INTERLOCUTORY APPEAL.

Petitioner has not supported its burden of showing the exceptional circumstances amounting to judicial usurpation of power which must be present to justify the invocation of the extraordinary remedy of a Writ of Mandamus to the Sixth Circuit Court of Appeals. *Kerr* v *United States*, 426 US 394 (1976).

On numerous occasions, this Court has held that a Writ of Mandamus will issue only where the duty to be performed is ministerial and the obligation to act is peremptory and plainly defined. *U.S. ex. rel. McLellan* v *Wilbur*, 283 US 414 (1931). Mandamus will not issue to compel a discretionary act: the law must not only authorize the demanded action, but require it. 283 US at 420. Mandamus is not employed to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken. *Wilbur* v *US*, 281 US 206, 218 (1930).

The act complained of by petitioner was a discretionary act of the Sixth Circuit Court of Appeals. As this Court held in *Western Pacific Railroad Case*, 345 US 247 (1953) a rehearing *en banc* is not a right of a litigant, but is a grant of discretionary power to the Circuit Courts of Appeals. 345 US at 259. Not only is the act of granting a rehearing *en banc* discretionary, but the procedure employed by the Court of Appeals in ordering a rehearing *en banc* is a matter of Circuit Court administration. Each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how to exercise its power of *en banc* rehearing. 345 US at 259. For this court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals. This Court rejected such involvement in

Shenker v *Baltimore & Ohio Railroad Co*, 374 US 1, 5 (1963). Mandamus will not issue to compel the Sixth Circuit Court of Appeals to exercise its discretion in ordering a rehearing *en banc*, nor to compel the Sixth Circuit Court of Appeals to adopt a particular procedure in administering its power to order a rehearing *en banc*. On this basis alone, petitioner's application for Writ of Mandamus must be denied.

However, the facts of this case present a number of other reasons which require a denial of the petition for Writ of Mandamus, and each is briefly discussed below.

A Writ of Mandamus will not issue to compel a particular statutory construction. The duty sought to be enforced must be plainly described and must not rely upon statutory construction. *Wilbur* v *US*, *supra*, 281 US at 219.

Petitioner's application must be denied when it asks this Court to order the Sixth Circuit Court of Appeals to adopt a particular construction of 28 USC 46(c). The Sixth Circuit's construction of 28 USC 46(c) is reasonable and is not an abuse of power. In fact, the Sixth Circuit's procedure for exercising its *en banc* power is consistent with the plain language of 28 USC 46(c) and has been followed by other circuits. *See*, e.g., *Porter County Chapter of the Izaak Walton League of America, Inc* v *Atomic Energy Commission*, 515 F2d 513 (7th Cir, 1975); *Ford Motor Co* v *Federal Trade Commission*, 673 F2d 1008 (9th Cir, 1982).

This court has expressly refused to require unanimity of internal administrative procedures of the circuit courts in exercising their *en banc* power. *Shenker* v *Baltimore & Ohio Railroad Co*, *supra*. The procedure adopted by the Fourth Circuit in *Arnold* v *Eastern Air Lines*, 712 F2d 899 (1983) may be permissibly unique to the Fourth Circuit. This will be decided by Petition for Certiorari filed in that case. In any event, that court's procedure is not binding on the Sixth Circuit, nor does it present an impermissible "conflict amoung the circuits". In fact, the Fourth Circuit

noted in its opinion that its procedure for ordering *en banc* rehearings may change in the future. 712 F2d at 902.

The variation in interpretation and construction of 28 USC 46(c) between the Fourth Circuit on the one hand and the Sixth, Seventh and Ninth Circuits on the other hand pointed out by petitioner in its application, in fact precludes the issuance of a Writ of Mandamus since the right sought to be enforced is not clear and peremptory.

Finally, this Court has repeatedly held that a Writ of Mandamus will not be granted as a substitute for appeal. Ruby Clark filed her Complaint for defamation against petitioner on April 19, 1978. She has yet to have her trial on the merits. On November 11, 1982, the Sixth Circuit ordered this case to a jury trial. All appeals for rehearing and for certiorari to this Court have been from the interlocutory order of the Sixth Circuit. Petitioner may yet prevail on the merits and its claims of error then will be moot. However, if Ruby Clark prevails on the merits, petitioner still has all rights of appeal from such a final judgment.

Writs of Mandamus against judges are drastic and extraordinary writs which should be resorted to only where appeal is a clearly inadequate remedy. This court will not use them as substitutes for appeals. *Ex Parte Fahey*, 332 US 258, 259-260 (1947). It has been Congress' determination since the Judiciary Act of 1789 that, as a general rule, appellate review should be postponed until after final judgment has been rendered by the trial court. A judicial readiness to issue the Writ of Mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress. *Kerr* v *United States*, *supra*, 426 US at 403. Even if the trial and final judgment may take several months, this court will nevertheless require such a final judgment and reject the "piecemeal" appeals raised by petitions for issuance of a Writ of Mandamus. *Roche* v *Evaporated Milk Association*, 319 US 21 (1943).

Nor will the Writ of Mandamus be used by this court to control interlocutory orders in the conduct of judicial proceedings. The fact that the result of the litigation may possibly be such that the interlocutory proceedings taken may not prove of value is not a sufficient reason for calling the writ into use—even where the interlocutory order cannot be reversed on error or on appeal. *Ex Parte Wagner*, 249 US 465, 471 (1919).

CONCLUSION

Petitioner seeks, at most, substitution of this court's judgment for that of the Sixth Circuit in the Sixth's Circuit's exercise of its *en banc* power.

The Writ of Mandamus may not issue to direct the exercise of the Sixth Circuit's discretion. Nor may the writ issue to compel a particular statutory construction, nor as a substitute for appeal.

The case has yet to be submitted for a decision on the merits and for final judgment. Ruby Clark respectfully requests this Court deny the Petition for Writ of Mandamus.

Respectfully submitted,
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